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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20054

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

Implementation of Cable Act )  
Reform Provisions of the )  
Telecommunications Act )  
of 1996 )

CS Docket No. 96-85

To: The Commission

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JOINT COMMENTS

United States Wireless Cable, Inc. ("U.S. Wireless") and Wedgewood Communications, Inc. ("Wedgewood") through counsel, and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415 hereby submit joint comments in the above-captioned proceeding.<sup>1/</sup> U.S. Wireless is a wireless cable operator and Wedgewood is a private cable operator. Both commenters provide video programming to subscribers in multiple dwelling units ("MDUs") in various areas of the country.

Several issues raised in the NPRM will directly affect the financial and business operations of wireless and private cable operators. For these reasons, the parties respectfully submit these comments with regard to the following issues: (1) Bulk discounts should only be available to MDUs, as negotiated with

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<sup>1/</sup> Order and Notice of Proposed Rulemaking, CS Docket No. 96-85, FCC 96-154, Released April 9, 1996 ("Order" and "NPRM"). By Public Notice released May 9, 1996, DA 96-726, the FCC extended the comment due date to June 4, 1996.

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property owners, not to individual tenants in MDUs, (2) consistent with congressional intent, the FCC should not modify the definition of MDUs, and (3) when reviewing allegations of predatory pricing, the FCC's price-cost analysis should take into account programming discounts enjoyed by large wired cable MSOs.

**I. Bulk Discounts Must Only Be Offered to MDUs,  
Not To Individual Tenants or Units.**

The Telecommunications Act of 1996 Pub. L. No. 104-104, 100 Stat. 56 (1996) ("1996 Act") amends the uniform rate structure requirement set forth in Section 623(d) of the Communications Act of 1934, as amended (the "Act"), to include, inter alia, an exemption for bulk discounts. See, Section 301(b)(2) of the 1996 Act.

The Commission tentatively concludes that this exemption should not be construed to allow cable operators to offer discounted rates to individual subscribers in MDUs "simply because they are residents of a multiple dwelling unit[.]" NPRM at ¶ 97-8. U. S. Wireless and Wedgewood agree with this conclusion. To interpret the exemption otherwise would defeat the purpose of bulk discounts and create anticompetitive conditions in MDUs. The term "bulk discount" is clear and the Commission therefore lacks statutory authority to permit unit-by-unit discounts.

The Cable Consumer Protection and Competition Act of 1992, Pub. L. No. 102-835, 106 Stat 1460 (1992) ("1992 Cable Act") required cable operators to provide a uniform rate structure in

geographic areas. See, 47 U.S.C. §543(d). In implementing the 1992 Cable Act, the FCC determined that this requirement did not prohibit cable operators from offering discounted rates, or "bulk discounts" to MDUs, on a uniform basis.<sup>2/</sup> Pursuant to further rulemakings, the FCC clarified that Congressional language required cable operators to offer uniform bulk rate arrangements to all buildings of the same size and contractual duration in a franchise area.<sup>3/</sup>

The 1996 Act's amendment to Section 623(d) merely codifies the Commission's bulk discount rule -- and clarifies Congressional intent that effective competition must exist. The 1996 Act does not change the requirement that a "bulk discount" must be offered to MDUs, as negotiated with property owners, or cooperative and condominium associations. Allowing selective discounts to individual subscribers would violate the uniform rate requirements of the 1992 and 1996 Acts. Congress did not eliminate the uniform rate requirement or sanction selective and/or discriminatory rates for individual subscribers whether living in an MDU or in a single-family home. Only "bulk discounts" are exempt from the uniform rate provision.

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<sup>2/</sup> See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631, 5897-98 (1993) ("Rate Order").

<sup>3/</sup> See Third Order on Reconsideration Rate Regulation and Buy-Through Prohibition, MM Docket No. 92-266, MM Docket No. 92-262, 74 RR 2d 1275, 1285 (1994) ("Recon. Rate Order").

The FCC has specifically noted its concern that bulk discounts may be abused by cable operators to displace alternative multichannel video distributors from MDUs, "which have become important footholds for the establishment of competition to incumbent cable systems." Rate Order at 5898. The 1996 Act is predicated on advancing competition in the telecommunications marketplace. Competition can only be achieved by retaining the requirement that bulk discounts be offered only to MDUs, as negotiated with the property owners or managers.

## **II. The 1996 Act Did Not Change the Definition of an MDU.**

The NPRM further requests comment on whether the FCC should change the definition of an MDU, in light of the fact that the 1996 Act expanded the private cable exemption. NPRM at ¶ 99. On the contrary, Congress took pains not to alter the definition of an MDU when Congress expanded the private cable exemption. Thus, the FCC is without authority to do so now.

Section 301(a)(2) of the 1996 Act expands the private cable exemption in Section 602(7) of the Act to include all facilities that do not use public rights-of-way. Congress amended the private cable exemption by eliminating the reference to MDUs. Prior to the 1996 Act, the private carrier cable exemption read: "... a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right of way; ..." NPRM ¶ 52. The 1996 Act amended the

definition by striking the reference to MDUs, so that the exemption now reads: "a facility that serves subscribers without using any public right-of-way." NPRM ¶ 54. Congress did not redefine the term MDU. To the contrary, Congress left the term MDU untouched, as interpreted in many prior cases.

In these prior cases, the FCC has held that an MDU means a multiple dwelling unit. MDU does not include trailer parks, resorts, subdivisions, or any other collection of detached units. Congress was well-aware of the definition of an MDU when it chose to use that term in the bulk discount provision. Bulk discounts must be limited to MDUs as historically defined; no statutory support exists to change the definition of an MDU.

**III. In Determining the Existence of Predatory Pricing,  
The FCC Should Account for Programming Discounts to  
Large Cable Operators.**

While the 1996 Act exempts bulk discounts to MDUs from the uniform rate provisions, it continues to prohibit cable operators subject to effective competition from charging predatory prices to MDUs. See Section 301(b)(2). In the NPRM, the FCC notes its intention to review allegations of predatory pricing under the principles of federal antitrust law. NPRM at ¶ 100. In doing so, U.S. Wireless and Wedgewood wish to emphasize certain factors that should be accounted for in a price-cost analysis.

The Supreme Court has defined predatory pricing as "pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition

in the long run." ABA Antitrust Section, Antitrust Law Dev. 227 (3d. ed 1992) (quoting Cagrill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 117 (1986)). In evaluating a predatory pricing claim, cases have focused on three separate factors: (1) price-cost analysis, (2) predatory intent, and (3) likelihood of recoupment. Id. With regard to the appropriate measure of cost, for the last two decades courts have relied on the Areeda-Turner Test<sup>4/</sup>: prices below reasonable anticipated marginal cost would be deemed predatory, while prices at or above reasonable anticipated marginal costs would be deemed nonpredatory. Average variable costs have often been substituted for marginal costs for simplicity. Antitrust Law Dev. at 228.

One of the most important cost factors for both wired cable operators and their fledgling wireless and private cable competitors is the cost of programming. Large cable MSOs obtain substantial discounts on programming, because, among other reasons, they own the program suppliers, in whole or in part. Private and wireless cable operators cannot obtain such discounts because they do not own programmers such as CNN, Showtime, HBO, and other popular cable fare owned by large cable MSOs. Based on these discounts, cable MSOs set rates at lower levels than their competitors, and justify these predatory prices based on lower costs. Small cable and private cable operators, without

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<sup>4/</sup> Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697 (1975).

programming discounts, cannot meet their prices without going out of business.

To protect wireless and private cable operators from predatory pricing, the FCC must base its cost calculations on the small cable or private cable operators' costs, not on the discounted program costs enjoyed by large cable operators. In this way the FCC could help to ensure a level playing field and prevent large cable operators from defending unreasonably low prices based on their lower programming discounts.

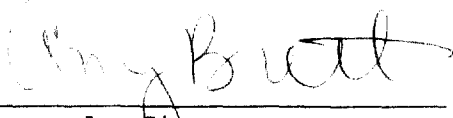
#### **Conclusion**

For the reasons set forth herein, U.S. Wireless and Wedgewood respectfully request that the FCC give consideration to these issues when adopting its Order in this Notice of Proposed Rulemaking.

Respectfully submitted,

UNITED STATES WIRELESS CABLE, INC.

WEDGEWOOD COMMUNICATIONS, INC.

  
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June 4, 1996

**CERTIFICATE OF SERVICE**

I, Magdalene Copp, a legal secretary for the law firm of  
Ross & Hardies, hereby certify that a copy of the foregoing  
**"Joint Comments"** was served via hand delivery, on this **4th** day of  
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